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THE SEVERABILITY OF LEGISLATIVE VETO PROVISIONS: AN EXAMINATION OF THE CONGRESSIONAL BUDGET AND IMPOUNDMENT CONTROL ACT OF 1974

The Congressional Budget and Impoundment Control Act of 1974¹ (the Act) represents a significant legislative effort to maintain congressional control over the federal budget.² The Act unites two originally separate legislative initiatives:³ budget process reform (Titles I-IX)⁴ and impoundment control reform (Title X).⁵ Section 1013(b)⁶ of Title X⁷

1. Pub. L. No. 93-344; 88 Stat. 297 (1974) (principally codified in 2 U.S.C. §§ 190d, 601-604, 621-623, 631-642, 651- 653, 661, 681-688 (1982)).

2. See, e.g., CONGRESSIONAL BUDGET AND IMPOUNDMENT CONTROL ACT OF 1974-CONFERENCE REPORT, S. REP. NO. 924, 93d Cong., 2d Sess. 49, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 3462, 3591 [hereinafter cited as CONFERENCE REPORT]. See generally Levine, *The Congressional Role in Formulating National Policy: Some Observations on the First Session of the Ninety-third Congress*, 11 HARV. J. ON LEGIS. 161, 161-63 (1974); Fisher, *Congressional Budget Reform: The First Two Years*, 14 HARV. J. ON LEGIS. 413 (1977).

3. H.R. REP. NO. 658, 93d Cong., 1st Sess. 18-19 (1973) (brief summary of the Act's legislative history in the House of Representatives) [hereinafter cited as H.R. 7130-REPORT]; *Conferees Approve Budget Procedures Reform*, 32 CONG. Q. WEEKLY REP. 1590 (1974). Budget process reform sprang from the "battle of the budget" between President Nixon and a Democratic Congress. Congress initiated budget reform by creating the Joint Study Committee on Budget Control to investigate alternative reforms. Schick, *Budget Reform Legislation: Reorganizing Congressional Centers of Fiscal Power*, 11 HARV. J. ON LEGIS. 303, 309-26 (1974). The movement for impoundment control reform grew from President Nixon's assertion that the "constitutional right for the President of the United States to impound funds . . . is absolutely clear," 9 WEEKLY COMP. PRES. DOC. 110 (1973), and from the unprecedented number of impoundments. S. REP. NO. 93-121, 93d Cong., 1st Sess. 9-10 (1973) [hereinafter cited as S. 373-REPORT]. See generally J. PFIFFNER, *THE PRESIDENT, THE BUDGET, AND CONGRESS: IMPOUNDMENT AND THE 1974 BUDGET ACT 4* (1979) (concluding that "[t]he greatest impetus for the 1974 budget reform was President Nixon's impoundment of funds").

4. 2 U.S.C. §§ 190d, 601-603, 621-623, 631-642, 651-653, 661 (1982) (principal provisions). Section 1(a) of the Act entitles Titles I-IX the "Congressional Budget Act of 1974." Pub. L. No. 93-344 § 1(a). Titles I-IX are not a perfectly unified package. Nonetheless, because they predominately and sufficiently pertain to budget process reform, this Note will refer to Titles I-IX as a unified statutory package.

5. 2 U.S.C. §§ 681-688 (1982). Section 1(a) of the Act entitles Title X the "Impoundment Control Act of 1974." Pub. L. No. 93-344 § 1(a).

6. Section 1013(b) provides that: "Any amount of budget authority proposed to be deferred . . . shall be made available for obligation if either House of Congress passes an impoundment resolution disapproving such proposed deferral." 2 U.S.C. 684(b) (1982) (emphasis added).

7. In addition to section 1013(b)'s deferral mechanism, Section 1012 of Title X prohibits any impoundment of budget authority beyond the fiscal year of the impoundment without approval by traditional legislation. Section 1012(a) of Title X allows the President to propose a rescission of budget authority whenever he —

allows one House of Congress to veto⁸ any executive defer-

determines that all or part of any budget authority will not be required to carry out the full objectives or scope of programs for which it is provided or that such budget authority should be rescinded for fiscal policy or other reasons (including the termination of authorized projects or activities for which budget authority has been provided), or whenever all or part of budget authority provided for only one fiscal year is to be reserved from obligation for such fiscal year

2 U.S.C. § 683(a) (1982). Title X also amended the Antideficiency Act—section 1002. Section 1002 is codified at 2 U.S.C. § 665(c)(2) (1982).

The Antideficiency Act of 1950 authorized the Executive to impound appropriated funds for contingencies, savings, and other developments. The Antideficiency Act served as the Nixon Administration's chief justification for an expanded executive impoundment authority. The Nixon Administration frequently justified its many impoundments as prudent fiscal policy exercised on authority derived from the clause "other developments." In § 1002 of Title X, Congress removed the clause "other developments" from the Antideficiency Act. *See generally* Fisher, *supra* note 2, at 445-46 (discussion of the Nixon Administration's use of the term "other developments"); COMPTROLLER GENERAL OF THE UNITED STATES, VIEWS OF IMPOUNDMENT CONTROL ACT, 1974, S. Doc. No. 18, 94th Cong., 1st Sess. 5-7 (1975) (communication to Congress regarding the Comptroller General's interpretation and application of Title X) [hereinafter cited as COMPTROLLER GENERAL].

A dispute exists whether Title X grants the Executive *additional* congressional authority to impound beyond authority granted in the Antideficiency Act or specific appropriations acts, or solely establishes a process for congressional control over impoundments. *See generally Id.* at 14 (concluding that Title X provides some separate authorization for executive deferrals). The resolution of whether Congress *actually* delegated further impoundment authority through Title X should not influence the decision concerning section 1013(b)'s severability from Title X. *See infra* note 118.

8. Title X's legislative veto, section 1013(b), allows one House of Congress to defeat an executive deferral of budget authority by passing "an impoundment resolution disapproving such proposed deferral." 2 U.S.C. § 684(b) (1982). The Executive must deliver "a special message specifying":

- (1) the amount of budget authority that he proposes to have rescinded or to defer;
- (2) any account, department, or establishment of the Government to which such budget authority is available for obligation, and the specific projects or governmental functions involved;
- (3) the reasons why the budget authority should be rescinded or is to be deferred;
- (4) to the maximum extent practicable, the estimated fiscal, economic, and budgetary effect of the proposed rescission or deferral; and
- (5) all facts, circumstances, and considerations relating to or bearing upon the proposed rescission or deferral and the decision to effect the proposed rescission or the reservation, and to the maximum extent practicable, the estimated effect of the proposed rescission or deferral upon the objects, purposes, and programs for which the budget authority is provided.

2 U.S.C. § 684(a). The Executive delivers the message to the House of Representatives, the Senate, and the Comptroller General. Exec. Order No. 11,845, 3 C.F.R. 970 (1971-1975 Compilation), authorizes the Office of Management and Budget to transmit deferral and rescission messages to Congress.

Regarding all deferrals of budget authority, the Comptroller General shall inform Congress of "(A) the facts surrounding each proposed deferral of budget authority (including the probable effects thereof) and (B) whether or not (or to what extent), in his judgment, such proposed deferral is in accordance with existing statutory authority." 2 U.S.C. § 685(b)(2). The Comptroller General also reports the Executive's incorrect classifications of and failures to transmit impoundment messages. 2 U.S.C. § 686. Finally, the Comptroller General may bring a civil suit to require the Executive to exercise budget authority improperly deferred or rescinded. 2 U.S.C. § 687. *See generally* Fisher, *supra* note 2, at 444. For a general discussion of legislative veto provisions, see Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*,

ral⁹ of budget authority.¹⁰ In *INS v. Chadha*,¹¹ the Supreme Court held that a similar one-house legislative veto provision was an unconstitutional departure from the bicameral and presentment procedures required by article I.¹²

Approximately 120 federal statutes contain legislative veto provisions. *Chadha* apparently invalidates nearly all legislative vetos.¹³ Consequently, federal courts frequently will have to determine whether statutes remain valid after the excision of their legislative veto provisions. The potential, therefore, exists for numerous differences among courts regarding the severability of legislative vetos from these 120 statutes.¹⁴ A uniform framework for determining when a veto provision properly may be severed from an otherwise valid statute may lessen the number

63 CALIF. L. REV. 983, 984-1029 (1975) (a general description of legislative vetos, related devices, and both their evolutions).

9. 2 U.S.C. § 684(b) (1982). Title X section 1011(1) defines an Executive deferral to include:

(A) withholding or delaying the obligation or expenditure of budget authority (whether by establishing reserves or otherwise) provided for projects or activities; or

(B) any other type of Executive action or inaction which effectively precludes the obligation or expenditure of budget authority, including authority to obligate by contract in advance of appropriations as specifically authorized by law; . . .

A deferral of budget authority, in effect, is any impoundment that is not a rescission. Section 1013(c) limits the application of section 1013 to those impoundments not classified as rescissions by section 1012(a). See generally 120 CONG. REC. 20473 (colloquy between Sen. Ervin and Sen. McClellan); A. SCHICK, THE IMPOUNDMENT CONTROL ACT OF 1974: LEGISLATIVE HISTORY AND IMPLEMENTATION 49 (Feb. 27, 1976) (Congressional Research Service Multilith 76-455). For a discussion of the problems regarding the definition of impoundments generally, see Note, *Presidential Impoundment: Constitutional Theories and Political Realities*, 61 GEO. L.J. 1295 (1973).

10. Section 3(a)(2) of the Act defines budget authority in the following manner: "The term 'budget authority' means authority provided by law to enter into obligations which will result in immediate or future outlays involving Government funds, except that such term does not include authority to insure or guarantee the repayment of indebtedness incurred by another person or government." 2 U.S.C. § 622(2) (1982).

11. 103 S. Ct. 2764 (1983).

12. See *infra* text accompanying notes 17-27. The bicameral and presentment clauses of article I specify that:

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives. Art. I, § 1.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; . . . Art. I, § 7, cl. 2.

Every Order, Resolution, or vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill. Art. I, § 7, cl. 3.

quoted in *INS v. Chadha*, 103 S. Ct. 2764, 2781 (1983). (emphasis added by the Court).

13. See *infra* note 28 and accompanying text. See generally Watson, *supra* note 8 (description and analysis of various types of legislative vetos).

14. The potential splits have become reality. Compare, e.g., *EEOC v. Hernando Bank, Inc.*, 724 F.2d 1188 (5th Cir. 1984) (holding severable the one-house legislative veto provision of the

of conflicting judicial opinions.¹⁵

This Note examines the constitutionality of the legislative veto provision (section 1013(b)) in the Congressional Budget and Impoundment Control Act, and discusses section 1013(b)'s and Title X's severability from the Act. Part I demonstrates that *Chadha* invalidates section 1013(b). Part II outlines the traditional severability doctrine.¹⁶ Part III proposes a refined model of the severability doctrine with which to resolve severability conflicts involving legislative veto provisions. Part IV applies the proposed severability model to the Congressional Budget and Impoundment Control Act, and concludes that section 1013(b)'s unconstitutionality requires that the entire Congressional Budget and Impoundment Control Act fall.

I. CONSTITUTIONALITY OF SECTION 1013(b)

A. *The Chadha Decision*

The Supreme Court in *Chadha* held the one-House legislative veto provision of the Immigration and Nationality Act, section 244(c)(2), unconstitutional.¹⁷ Section 244(c)(2) allowed either chamber of Congress to defeat the Attorney General's decision to suspend deportation proceedings against deportable aliens.¹⁸ In *Chadha*, the Court reasoned

Reorganization Act of 1977) and *EEOC v. Ingersoll Johnson Steel Co.*, 583 F. Supp. 983 (S.D. Ind. 1984) (same) with *EEOC v. Martin Indus., Inc.*, 581 F. Supp. 1029 (N.D. Ala. 1984) (holding the provision ins severable, and consequently invalidating Reorganization Plan No. 1 of 1978, which authorized the EEOC to enforce the Equal Pay Act and the Age Discrimination in Employment Act); *EEOC v. Chrysler Corp.*, 33 Fair Empl. Prac. Cas. (BNA) 1839 (E.D. Mich. 1984) (same) and *EEOC v. Westinghouse Elec. Corp.*, 33 Fair Empl. Prac. Cas. (BNA) 1232 (W.D. Pa. 1984) (same). See also *In re Department of Energy Stripper Well Litig.*, 578 F. Supp. 586, 600 (D. Kan. 1983); *Allen v. Carmen*, 578 F. Supp. 951, 968-71 (D.D.C. 1983). No comprehensive congressional response to *Chadha* appears imminent. See generally Rosenberg, *Congressional Life after Chadha: Searching for an Institutional Response*, CRS REVIEW, Fall 1983, at 5; Sylvester, *After Chadha, A Legal Void*, NAT'L L.J., Apr. 23, 1984, at 1.

15. The debate over the constitutionality of numerous congressional statutes in the 1930s occasioned Robert Stern's classic article on severability and the severability doctrine. See generally Stern, *Separability and Separability Clauses in the Supreme Court*, 51 HARV. L. REV. 76 (1937).

16. See *infra* text accompanying notes 52-62.

17. *INS v. Chadha*, 103 S. Ct. 2764, 2787 (1983).

18. Section 244(c)(2) reads:

In the case of an alien specified in paragraph (1) of subsection (a) of this section — if during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien If, within the time above specified, neither the Senate nor the House of Representatives shall pass such a resolution, the Attorney General shall cancel deportation proceedings.

8 U.S.C. § 1254(c)(2) (1982) (emphasis added).

that section 244(c)(2) constituted *legislative* action that must conform with article I's bicameral and presentment clauses, because it "was not within any of the express constitutional exceptions authorizing one House to act alone."¹⁹ Consequently, the Court held section 244(c)(2) invalid.²⁰

In characterizing the congressional veto provision in *Chadha* as legislative action subject to article I's bicameral and presentment requirements, the Court examined three factors: (1) the purpose and effect of the legislative veto provision; (2) the nature of the decision implemented by the one-House veto; and (3) the character of the congressional action that the legislative veto provision supplanted.²¹ In *Chadha*, the Court concluded that section 244(c)(2) was legislative action in *purpose and effect* because the provision "had the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch."²² The Court in *Chadha* also found the *nature* of the House of Representatives' decision to rescind the Attorney General's suspension of *Chadha's* deportation similar to the nature of traditional legislation.²³ Chief Justice Burger, writing for the majority,²⁴ equated the nature of Congress's choice to delegate authority to the executive branch to allow deportable aliens to remain in the United States with the nature of the decision by one House of Congress to rescind the executive action.²⁵ Both decisions, the Court rea-

19. In *Chadha*, Chief Justice Burger cited four constitutional exceptions to article I's presentment and bicameral requirements under which one House of Congress may act with the "unreviewable force of law":

(a) The House of Representatives alone was given the power to initiate impeachments. Art. I, § 2, cl. 6;

(b) The Senate alone was given the power to conduct trials following impeachment on charges initiated by the House and to convict following trial. Art. I, § 3, cl. 5;

(c) The Senate alone was given final unreviewable power to approve or to disapprove presidential appointments. Art. II, § 2, cl. 2;

(d) The Senate alone was given unreviewable power to ratify treaties negotiated by the President. Art. II, § 2, cl. 2.

INS v. *Chadha*, 103 S. Ct. 2764, 2786 (1983).

20. *Id.* at 2787.

21. *Id.* at 2784-86.

22. *Id.* at 2784.

23. *Id.* at 2786.

24. In *Chadha*, Justice Powell wrote a concurring opinion in which he also found section 244(c)(2)'s one-House legislative veto unconstitutional but on the narrower basis that Congress had "assumed a judicial function in violation of the principle of separation of powers." *Id.* at 2789. Justice White filed a dissent in which he argued against ruling legislative vetos unconstitutional under article I's presentment and bicameral clauses or, in this particular instance, separation of powers principles. Justice White reasoned that not "all legislative vetoes are necessarily consistent with separation of powers principles." *Id.* at 2810. Yet legislative vetos may be "a necessary check on the unavoidably expanding power of the agencies, both executive and independent, as they engage in exercising authority delegated by Congress." *Id.* Justice Rehnquist wrote a dissenting opinion limited to section 244(c)(2)'s severability from the Immigration and Nationality Act. *Id.* at 2816-17.

25. *Id.* at 2786.

soned, involve policy determinations that are effective only upon compliance with article I's legislative enactment procedures.²⁶ Finally, the Court in *Chadha* determined that the congressional action that section 244(c)(2) replaced had a legislative *character*.²⁷ Prior to the adoption of section 244(c)(2), Congress was forced to enact legislation to defeat the executive branch's suspension of deportation proceedings.

B. *The Application of Chadha to Section 1013(b)*

The Court's reasoning in *Chadha* and in its subsequent decisions appears to invalidate all legislative vetoes²⁸ not subject to the single enactment procedure of article I.²⁹ Section 1013(b) authorizes either House of Congress to defeat the President's deferral³⁰ of budget authority³¹ by a simple resolution of disapproval.³² Section 1013(b), therefore, presents the paradigm of a one-House legislative veto.³³ Although section 1013(b) challenges the underlying philosophy of the Constitu-

26. *Id.*

27. *Id.* at 2785.

28. *E.g.*, *INS v. Chadha*, 103 S. Ct. 2764, 2788 (Powell, J., concurring); *id.* at 2792 (White, J., dissenting); 129 Cong. Rec. H4797 (daily ed. June 29, 1983) (remarks of Reps. Levitas and Broyhill); 129 CONG. REC. S9742-45 (daily ed. July 12, 1983) (articles from New York Times June 23-24, 1983, with comments of legislative veto authorities); Note, *INS v. Chadha: The Death Knell for the Legislative Veto?*, 69 IOWA L. REV. 513 (1984).

The Courts broad language in *Chadha* supports the contention that *Chadha* invalidated all legislative vetoes. The Court emphasized absolute adherence to article I:

The bicameral requirement, the Presentment Clauses, the President's veto, and Congress' power to override a veto were intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps. To preserve those checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded.

Chadha, 103 S. Ct. at 2787. Following *Chadha* the Court summarily affirmed the D.C. Circuit's invalidation of the one-House legislative veto in the Natural Gas Policy Act, *Process Gas Consumers Group v. Consumers Energy Council of Am.*, 103 S. Ct. 3556 (1983), *aff'g mem. sub nom. Consumer Energy Council of Am. v. Federal Energy Regulatory Comm'n*, 673 F.2d 425 (D.C. Cir. 1982), and the concurrent resolution legislative veto in the Federal Trade Commission Improvements Act, *id.* at 3556, *aff'g mem. sub nom. Consumers Union of U.S., Inc. v. FTC*, 691 F.2d 575 (D.C. Cir. 1982) (per curiam). Both provisions served as a check upon independent regulatory agencies. Justice White dissented in the preceding summary affirmations. He argued that "[w]here the veto is placed as a check upon the actions of the independent regulatory agencies, the article I analysis relied upon in *Chadha* has a particularly hollow ring." *Id.* at 3558. ring." *Id.* at 3558.

29. The presentment clauses, U.S. CONST. art. I, § 7, cls. 2, 3, and bicameral clauses, U.S. CONST. art. I, §§ 1, 7, cl. 2, are the "[e]xplicit and unambiguous provisions of the Constitution [that] prescribe and define the respective functions of the Congress and of the Executive in the legislative process." *INS v. Chadha*, 103 S. Ct. 2764, 2781 (1983).

30. See *supra* note 9.

31. See *supra* note 10.

32. Section 1011(4) of Title X provides that "'impoundment resolution' means a resolution of the House of Representatives or the Senate which only expresses its disapproval of a proposed deferral of budget authority set forth in a special message transmitted by the President under section [1013]." 2 U.S.C. § 682(4) (1982).

33. See, e.g., Tate, *High Court Decision Reopens Dispute Over Impoundments; Congress*

tion's presentment and bicameral clauses less than section 244(c)(2),³⁴ consistent application of the Court's analysis in *Chadha* requires the invalidation of section 1013(b).³⁵

1. *The Purpose and Effect of Section 1013(b) Action*—Congressional action under section 1013(b) alters the legal rights and duties of persons outside the legislative branch, and, consequently, exhibits the *purpose and effect* of traditional legislation. Section 1013(b) allows one House of Congress to require the Executive to exercise budget authority³⁶ by spending funds that otherwise would have been impounded for the current fiscal year.³⁷ Although Congress neither conceded nor denied

Loses Spending Tool, 41 CONG. Q. 1331 (July 2, 1983); Watson, *supra* note 8, at 984-87, 987 n.8 (hypothetical statute illustrating various standard forms of the legislative veto).

Section 1013(b) is the only legislative veto provision of the Congressional Budget and Impoundment Control Act of 1974. Section 1012(b) of Title X requires affirmative congressional legislation, a "rescission bill," before executive rescission of budget authority. Congressional action regarding presidential rescission proposals falls within article I's bicameral enactment and presentment clauses. Section 1012(b), therefore, is not a legislative veto provision.

34. The protection of constitutionalism underlies the Court's ruling in *Chadha*. Chief Justice Burger asserted:

The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.

INS v. Chadha, 103 S. Ct. 2764, 2788 (1983). One essential element of constitutionalism is "fixed principles of reason." FISHER, *THE CONSTITUTION BETWEEN FRIENDS* 2 (1978). Without definite standards to limit state officials' exercise of power, constitutionalism weakens, and arbitrary and capricious rule abounds. In *Chadha*, the congressional exercise of a legislative veto to order *Chadha's* deportation appears especially arbitrary and capricious given the absence of an informed or uniform decision process and the judicial nature of the one-House action. See *INS v. Chadha*, 103 S.Ct. at 2771 & n.3; *id.* at 2788 (Powell, J., concurring).

When one House of Congress disapproves executive deferrals, however, Congress already has considered the particular budget authority deferred and delivered its policy choice in legislation in accordance with article I's procedures. Section 1013(b) seems consistent with the Constitution's framers' "determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process." *Id.* at 2788. The use of the legislative veto in such matters does not strongly threaten to damage "fixed principles of reason" or to promote arbitrary rule. Even the executive branch appears to agree that section 1013(b) does not present as severe challenge to article I as other legislative vetos such as section 244(c)(2). See CONGRESSIONAL RESEARCH SERVICE, 96TH CONG., 2D SESS., *STUDIES ON THE LEGISLATIVE VETO* 2 (Comm. Print 1980) (comments of Louis Fisher).

35. Additionally, section 1013(b) closely resembles section 244(c)(2) of the Immigration and Nationality Act in form. Each provision specifies that a one-House disapproval resolution shall defeat executive action authorized by its respective statute, and authorizes one House of Congress to reverse executive action that would remain effective without the passage of a disapproval resolution. Nevertheless, the presumption of constitutionality that the Court attaches to congressional statutes, see generally *INS v. Chadha*, 103 S. Ct. 2674, 2780-81 (1983), indicates that § 1013(b)'s character and effect, not merely its form, will determine whether that section will constitute legislative action subject to article I. See *id.* at 2784.

36. 2 U.S.C. § 684(b) (1982).

37. *Id.* § 684(a).

the constitutional basis of executive impoundment,³⁸ section 1013(a) grants the President statutory authority to defer the spending of congressionally appropriated funds.³⁹ Section 1013(b), however, allows a one-House resolution to compel the Executive to exercise deferred budget authority. "Congress has *acted* and its action has altered" the Executive's legal duties.⁴⁰

2. *The Nature of Section 1013(b) Action*— According to the Court's reasoning in *Chadha*, one-House congressional action under section 1013(b) manifests a legislative nature. The nature of Congress's choice to delegate to the Executive the statutory authority to defer budget authority parallels the nature of Congress's choice to prohibit a particular executive deferral. Congressional enactment of Title X involved policy determinations regarding whether and how to grant the Executive flexibility in and temporary control over the timing of federal spending.⁴¹ One-House impoundment resolutions likewise involve policy determinations regarding the wisdom of particular executive deferrals.⁴²

3. *The Legislative Character of the Supplanted Decision*— Prior to Title X, impoundment conflicts between Congress and the President centered around the issue of whether Congress must enact legislation beyond original appropriations legislation to defeat executive impoundments.⁴³ Congressional leaders generally maintained that Congress needed no further legislation to compel spending funds already appropriated.⁴⁴ The executive branch, however, proclaimed that only mandatory spending language would remove the Executive's prerogative to impound in certain circumstances.⁴⁵ Additionally, President Nixon declared that the Executive possessed a constitutional right to impound that was immune to legislative attack.⁴⁶ The federal judiciary skirted

38. The disclaimer section of Title X, section 1001, begins: "Nothing contained in this Act, or in any amendments made by this Act, shall be construed as— (1) asserting or conceding the constitutional powers or limitations of either Congress or the President." 2 U.S.C. § 681(1) (1982). For explanations of Congress' intention regarding this disclaimer, see 120 CONG. REC. 20,464-65 (1974) (REMARKS OF SEN. ERVIN) (concluding that Congress did not grant a general impoundment power) and COMPTROLLER GENERAL, *supra* note 7, at 12.

39. See COMPTROLLER GENERAL, *supra* note 7, at 14; see also *supra* text accompanying notes 129-30. A full discussion concerning the exact nature of Title X's delegation of power is beyond the scope of this Note.

41. For a brief discussion of the need for some degree of executive flexibility over the timing of spending budget authority, see 120 CONG. REC. 20,464-65 (1974) (remarks of Sen. Ervin).

42. For a discussion and analysis of congressional consideration of deferral messages, see Schick, *supra* note 9, at 8-24.

43. For a general discussion of the Nixon Administration's claims of executive authority to impound and congressional counter claims, see FISHER, *PRESIDENTIAL SPENDING POWER* 175-97 (1975).

44. *Id.* at 179.

45. For a brief discussion of the Executive's traditional statutory and managerial claims to impound appropriated funds, see *id.* at 147-58.

46. 9 WEEKLY COMP. PRES. DOC. 110 (1973). For analyses of the Executive's constitutional claims to impound funds, see FISHER, *supra* note 43, at 158-164; Note, *Impoundment of Funds*,

the constitutional issues and focused instead upon whether the particular appropriations legislation allowed discretionary executive spending.⁴⁷ The impoundment cases generally ruled against the President's claim to impound on the ground that the particular appropriations statutes made executive spending mandatory.⁴⁸ Nevertheless, the judiciary's investigation of statutory language in order to resolve impoundment disputes implicitly recognizes the validity of impoundments that are not specifically prohibited by legislation.⁴⁹

Furthermore, prior to Title X, Congress enacted legislation⁵⁰ — and, subsequent to Title X, Congress has used legislation⁵¹ — to limit Presidents' impoundments of budget authority. Section 1013(b) augments congressional control over executive impoundments, exercised previously and currently through legislative action subject to article I's prescriptions, with a legislative veto provision.

Section 1013(b), therefore, appears legislative in purpose, effect and nature, and supplants article I congressional action.⁵² Under the Court's constitutional analysis in *Chadha*, section 1013(b) is unconstitutional because "it [is] an exercise of legislative power" that is neither subjected to article I's legislative enactment procedures nor "within any of the express constitutional exceptions authorizing one House to act alone." Assuming section 1013(b)'s unconstitutionality, the issue of section 1013(b)'s severability from the Congressional Budget and Impoundment Control Act arises.

The subsequent section seeks to delineate the basic issues in severability conflicts and to establish the groundwork for Part III's severability model.

86 HARV. L. REV. 1505, 1513-16 (1973).

47. See, e.g., *Train v. City of New York*, 420 U.S. 35 (1975) (holding that the Clean Water Act required "full" allotment); Abascal & Kramer, *Presidential Impoundment Part II: Judicial and Legislative Responses*, 63 GEO. L. REV. 149, 149-68 (1974).

48. Abascal & Kramer, *supra* note 47, at 151; Schick, *supra* note 9, at 5. For the single Supreme Court interpretation of mandatory spending language, see *Train v. City of New York*, 420 U.S. 35 (1975).

49. Abascal & Kramer, *supra* note 47, at 150-51.

50. For discussions regarding various statutory limitations upon Executive impoundment prior to Title X's enactment, see Note, *supra* note 46, at 1516-29; FISHER, *supra* note 43, 152-58.

51. Congress still employs mandatory spending language to prohibit anticipated impoundments (deferrals). For example, in the Department of Transportation Appropriations Act of 1982 Congress disallowed any deferral of particular transportation budget items. Pub. L. No. 97-102, § 406, 95 Stat. 1442, 1466 (1981).

In its only disapproval of a deferral message since *Chadha*, Congress disapproved of the deferral of budget authority for the United States Railway Association (D84-20) in a rider to a supplemental appropriations act. Supplemental Appropriations Act, Domestic Housing and International Recovery and Financial Stability Act, Pub. L. No. 98-181, tit. XI, ch. V, 97 Stat. 1153, 1296 (1983).

52. See *supra* text accompanying notes 36-51.

II. THE TRADITIONAL SEVERABILITY DOCTRINE

The severability doctrine is a judicially created principle.⁵³ The doctrine provides that a partially unconstitutional statute's valid provision(s) remain effective if severable from the statute's invalid provision(s).⁵⁴ The federal and state judiciary adopted the doctrine long ago.⁵⁵ The earliest cases mentioning the doctrine investigated and prescribed the currently relevant judicial considerations regarding statutes' severability.⁵⁶

Generally, two considerations are relevant in determining the severability of an invalid statutory provision from the statute's remainder: first, whether the legislature would have enacted the statute without the invalid provision; and second, whether the statute remains legally and administratively operative without the invalid provisions.⁵⁷ Legislative intent, therefore, is the overarching consideration in judicial determinations of severability.⁵⁸

Judicial determinations of legislative intent are inherently subjective,⁵⁹ and this subjectivity leads to widely disparate results among cases involving the resolution of statutes' severability. Judges on the same bench

53. For a full discussion of the origins and development of the severability doctrine, see Stern, *supra* note 15.

54. An invalid word, clause, sentence, or action may be severed. See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); Stern, *supra* note 15, at 106.

55. *E.g.*, *Bank of Hamilton v. Dudley's Lessee* 27 U.S. (2 Pet.) 492, 526 (1829); *Clark v. Ellis*, 2 Blackf. 8, 11-12 (Ind. 1826). Stern, *supra* note 15, at 79-82.

56. *E.g.*, *Warren v. Mayor of Charlestown*, 68 Mass. (2 Gray) 84, 99 (1854); Note, *Effect of Separability Clauses in Statutes*, 40 HARV. L. REV. 626 (1927); Stern, *supra* note 15, at 80.

57. *E.g.*, *INS v. Chadha*, 103 S. Ct. 2764, 2774 (1983); *Dorchy v. Kansas*, 264 U.S. 286, 290 (1924) (criminal conviction of union leader invalid because unconstitutional compulsory arbitration provision inseverable from remainder of the statute); Stern, *supra* note 15, at 76.

58. See, *e.g.*, *INS v. Chadha*, 103 S. Ct. 2764, 2816-17 (1983) (Rehnquist, J., dissenting); *Carter v. Carter Coal Co.*, 298 U.S. 238, 312 (1936) (price fixing provisions of the Bituminous Coal Conservation Act of 1935 inseverable from the unconstitutional labor regulatory provisions); *Dorchy v. Kansas*, 264 U.S. 286, 290 (1924). Legislative intent, of course, discloses whether the legislature would have enacted the statute without its invalid provision(s). Additionally, legislative intent reveals whether the remaining valid portions of the statute continue their administrative operation in the manner intended by the legislature.

59. For a recent illustration of this subjectivity, compare *Grove City College v. Bell*, 104 S. Ct. 1211, 1220-22 (1984) (holding that legislative intent indicates that Title IX prohibits gender discrimination in higher education in *specific programs* receiving federal aid) with *id.* at 1231-35 (Brennan, J., dissenting) (arguing that legislative intent clearly shows that Congress intended Title IX to have institution-wide coverage). On its own, Justice White's opinion for the Court in *Grove City College* highlights the subjectivity of judicial interpretations of legislative intent. In *Chadha*, Justice White posited that a one-House resolution, despite *Chadha*, "could be read as a manifestation of legislative intent, which, unless itself contrary to the authorizing statute, serves as the definitive construction of the statute." *INS v. Chadha*, 103 S.Ct. 2764, 2796 n.11 (1983). Yet in *Grove City College* Justice White did not mention the fact that in November 1983 the House of Representatives voted 414-8 in support of a one-House resolution that proclaimed the broad institution-wide scope of Title IX. H.R. Res. 198, 98th Cong., 1st Sess. (1983);

reading the same statutory language and legislative history frequently reach opposing conclusions as to whether legislative intent directs that valid statutory language⁶⁰ stand or fall without the statute's invalid provision(s).⁶¹ Consequently, courts' unfettered discretion in determining statutes' severability is the "significant feature" of severability controversies.⁶² A modified version of the traditional approach to severability disputes, however, may decrease the number of disparate judicial evaluations of a particular statute's severability.

III. SEVERABILITY MODEL

Subjectivity permeates determinations of the severability of statutory provisions.⁶³ Still, that subjectivity does not prevent the formulation of a method of analysis. This section develops a severability model that suggests relevant questions and discards irrelevant considerations regarding the severability doctrine generally and particularly as applied to statutes containing legislative veto provisions.

129 CONG. REC. H10085-95, H10100-101 (daily ed. Nov. 16, 1983). See *Grove City College*, 104 S. Ct. at 4295 n.12 (Brennan, J., dissenting). For a discussion of whether legislative intent may be a fictional concept, see J. HURST, *DEALING WITH STATUTES* 32-40 (1982) (examining Max Radin's classic arguments concerning the unintelligibility of legislative intent).

60. Severability issues are split into two broad categories: (1) severable language—whether constitutional language is severable from unconstitutional language within a statute; and (2) severable applications—whether constitutional applications of a statutory provision are severable from unconstitutional applications. Stern, *supra* note 15, at 78-79. The severability of legislative veto provisions is a question of severable language; consequently, this Note's discussion only concerns severable language situations. Although the question of severable applications involves the same general considerations of legislative intent, severable applications controversies are an offshoot of the original severability doctrine. *Id.* at 115. Determination of whether a statute has severable applications primarily concerns statutory construction problems, i.e., whether a court should limit a statute's scope to constitutional applications and read unconstitutional applications out of the statute. *Id.* at 82. For a recent examination of severable applications problems, see Note, *Extension versus Invalidation of Underinclusive Statutes: A Remedial Alternative*, 12 COLUM. J.L. & SOC. PROBS. 115 (1975).

61. Compare *INS v. Chadha*, 103 S. Ct. 2764, 2774 (1983) (Burger, C.J.) (arguing that the Immigration and Nationality Act's legislative history supports the conclusion that section 244(c)(2)'s one-House veto provision is severable) with *id.* at 2816-17 (Rehnquist, J., dissenting) (concluding that legislative history indicates that section 244(c)(2) is inseverable from Congress' delegation of authority to suspend aliens' deportation (§ 244 of the Immigration and Nationality Act)).

62. Stern, *supra* note 15, at 110-11. For a recent example of judicial discretion regarding the finding of severability, compare *EEOC v. Allstate Ins. Co.*, 570 F. Supp. 1224 (S.D. Miss. 1983) (holding the one-House legislative veto provision of the Reorganization Act of 1977 inseverable, and, consequently, invalidating Reorganization Plan No. 1 of 1978 which transferred, the enforcement of the Equal Pay Act from the Labor Department to the EEOC), *appeal dismissed*, 104 S. Ct. 3499 (1984) with *Muller Optical Co. v. EEOC*, 574 F. Supp. 946 (W.D. Tenn. 1983) (finding the Reorganization Act of 1977's legislative veto provision severable from remainder of the Act, and, consequently, maintaining Reorganization Plan No. 1 of 1978, which also transferred enforcement of the Age Discrimination in Employment Act from the Labor Department to the EEOC); see also cases cited *supra* note 14.

63. See *supra* notes 59-62 and accompanying text.

A. *Inappropriateness of Presumptions Regarding Statutes' Severability*

Courts approach severability conflicts armed with numerous presumptions concerning statutes' severability or inseverability. For example, the presence or absence of a severability clause⁶⁴ frequently creates a presumption in favor of or in opposition to a statute's severability.⁶⁵ Additionally, the character of the constitutionally infirm provision often creates a presumption regarding a statute's severability.⁶⁶ Courts should not, however, use any presumptions regarding a statute's severability other than the general interpretative presumptions of constitutionality and the judicial duty to uphold as much of a statute as legally permissible and consistent with legislative intent.⁶⁷ Standardized presumptions of severability or inseverability, particularly as applied to the severability of legislative veto provisions, pose several problems.

First, presumptions mask a consideration that frequently determines a statute's severability — the substance and scope of the particular

64. Section 406 of the Immigration and Nationality Act presents a typical severability clause: "If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby." 8 U.S.C. § 1101 (1982).

65. For language citing the absence of a severability clause as evidence of a statute's inseverability, see *Williams v. Standard Oil Co.*, 278 U.S. 235, 241 (1928). In *Williams*, Justice Sutherland originally stated the standard presumptions regarding the presence or absence of a severability clause:

In the absence of such a legislative declaration, the presumption is that the legislature intends an act to be effective as an entirety

The effect of the statutory declaration (a severability clause) is to create in the place of the presumption just stated the opposite one of separability. That is to say, we begin, in the light of the declaration, with the presumption that the legislature intended the act to be divisible; and this presumption must be overcome by considerations which make evident the inseparability of its provisions or the clear probability that the invalid part being eliminated the legislature would not have been satisfied with what remains.

Id. at 241, 242.

For language emphasizing the importance of the presence of a severability clause, see *INS v. Chadha*, 103 S. Ct. 2764, 2774 (1983) ("we need not embark on that elusive inquiry since Congress itself has provided the answer to the question of severability in [the presence of a severability clause]"); *Consumer Energy Council of America v. Federal Energy Regulatory Comm'n*, 673 F.2d 425, 441 (D.C. Cir. 1982) (presence of severability clause "makes it extremely difficult for a party to demonstrate inseverability"), *aff'd mem. sub nom.* *Process Gas Consumers Group v. Consumers Energy Council of Am.*, 103 S. Ct. 3556 (1983). For language vitiating severability clauses, see *United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968) (resolution of severability controversies "will rarely turn on the presence or absence of such a clause"); *INS v. Chadha*, 103 S. Ct. at 2816 (Rehnquist, J., dissenting) (quoting *Jackson*).

66. *E.g.*, *Frost v. Corporation Comm'n*, 278 U.S. 515, 525 (1929) (a statutory amendment unconstitutional yet severable); *Davis v. Wallace*, 257 U.S. 478, 484-85 (1921) (an excepting provision unconstitutional and inseverable).

67. See *Atkins v. United States*, 556 F.2d 1028, 1083-84 (Ct. Cl. 1977) (Skelton, J., concurring and dissenting) (finding one-House legislative veto of the Federal Salary Act of 1967 constitutional); Stern, *supra* note 15, at 120 nn.199-200.

statute.⁶⁸ Although lack of judicial candor frequently proves troublesome in itself,⁶⁹ a greater harm exists if a court mechanically assumes that it has preserved congressional intent by severing significant legislation. Many legislative veto provisions are within major, comprehensive legislation.⁷⁰ Yet courts should not hastily find that such legislation includes distinct and severable purposes, but should respect congressional intent and examine the legislative circumstances of each act's adoption.⁷¹ Legislative veto provisions often constitute the essential element in significant statutory delegations of legislative authority.⁷² The severance of a legislative veto provision, therefore, may have the unintended effects of deference to the Executive branch and frustration of congressional intent. Courts should recognize that in saving the bulk of a statute they may destroy the legislative scheme.

Second, courts do not consistently apply these presumptions. The Supreme Court has relied heavily upon presumptions regarding severability.⁷³ In other cases, the Court has disparaged such presumptions.⁷⁴ Uncertainty results for both litigants and legislative draftsmen. This uncertainty seems especially onerous considering the numerous statutes containing legislative veto provisions.

Finally, the use of severability presumptions debases the importance of legislative intent in severability conflicts. Generalized presumptions

68. See *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 87 n.40 (1982) (comprehensive restructuring of bankruptcy laws precludes severance of any matter related to Title 11 from bankruptcy courts' jurisdiction); *Tilton v. Richardson*, 403 U.S. 672, 684 (1971) (act likely severable because important and broad statutory goals); *Utah Power & Light Co. v. Pfof*, 286 U.S. 165, 185 (1932) (comprehensive energy regulatory statute likely severable because broad scope).

69. See Stern, *supra* note 15, at 114. Severability or inseverability presumptions acting as camouflage for opinions based upon other reasoning are troublesome for two reasons. First, the judiciary misleads the legislature into believing that severability clauses are effective. Legislatures often respond mechanically, with careless, overinclusive draftsmanship. For example, the presumption of severability in constitutional litigation involving a statute with a severability clause may encourage states to enact general severability statutes applicable to all state statutes. See generally Note, *The Michigan General Separability Statute*, 46 COLUM. L. REV. 623, 628-629 (1947) (concluding that general severability statutes have little impact upon judicial determinations). Second, dissimilar results regarding severability conflicts arise in similar situations because different courts have different views of the substantive worth of the same statute. See Stern, *supra* note 15, at 112-114. Consequently, unpredictability reigns in adjudications raising severability conflicts. See cases cited *supra* note 62.

70. See, e.g., *Airline Deregulation Act of 1978*, Pub. L. No. 95-504, § 43(f)(3), 92 Stat. 1705, 1752, 49 U.S.C. 1552(f) (Supp. III 1979) (one-House disapproval resolution defeats rules and regulations governing employee protection program). See also *INS v. Chadha*, 103 S.Ct. 2764, 2811-16 (1983) (White, J., dissenting) (Appendix 1-collection of major statutes containing legislative veto provisions).

71. See *Jackson v. United States*, 390 U.S. 570, 585 n.27 (1968) (finding federal kidnap statute severable).

72. See *McCorkle v. U.S.*, 559 F.2d 1258, 1261 (4th Cir. 1977) (legislative veto inseverable from Federal Pay Comparability Act of 1970).

73. E.g., *INS v. Chadha*, 103 S. Ct. 2764, 2774 (1983) (presence of severability clause means "Congress itself has provided the answer to the question of severability").

74. E.g., *United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968) (the presence or absence

regarding all statutes' severability do not reveal the legislative intent behind a particular suspect statute, and instead, obscure the question of whether the legislature would have enacted the statute without the constitutionally infirm provisions.⁷⁵ Because of the varied nature and purposes of legislative vetos, judicial inquiry should focus upon the specific legislative intent behind statutes with legislative veto provisions, rather than upon general presumptions of severability or inseverability.⁷⁶ Standardized presumptions of severability or inseverability are inadequate proxies for close scrutiny of the legislative intent surrounding particular statutes.

B. Determination of Legislative Intent

Any determination of whether the legislature would have enacted a statute without its unconstitutional provision(s) should hinge upon the legislative intent surrounding that particular statute.⁷⁷ Courts should consider the following factors, when applicable, in order to determine whether the legislature would have enacted the statute absent unconstitutional parts.

1. Severability Clauses— Legislatures often use severability clauses indiscriminately.⁷⁸ Numerous examples exist to illustrate that although a legislature has included a severability clause, frequently it would not have enacted the legislation without the invalid provision(s).⁷⁹ Additionally, a severability clause without specific application does not accurately indicate whether the legislature would have enacted the statute without a particular suspect provision.

A severability clause, therefore, accurately and fully indicates legislative intent only when it *specifically* corresponds to particular sec-

of a severability clause "rarely" determines severability questions).

75. See Consumers Energy Council of Am. v. Federal Energy Regulatory Comm'n, 673 F.2d 425, 442 (D.C. Cir. 1982) (holding a one-House legislative veto provision in the Natural Gas Policy Act of 1978 unconstitutional and severable) ("We think the question where the presumption lies is mostly irrelevant, and serves only to obscure the crucial inquiry whether Congress would have enacted other portions of the statute in the absence of the invalidated provision."), *aff'd mem. sub nom.* Process Gas Consumers Group v. Consumers Energy Council of Am., 103 S. Ct. 3556 (1983); see also United States v. Jackson, 390 U.S. 570, 585 n.27 (1968).

76. See Consumers Energy Council of America v. Federal Energy Regulatory Comm'n, 673 F.2d 425, 445 n.70 (D.C. Cir. 1982), *aff'd mem. sub nom.* Process Gas Consumers Group v. Consumers Energy Council of Am., 103 S. Ct. 3556 (1983). But see McCorkle v. United States, 559 F.2d 1258, 1261 (4th Cir. 1977) (provisions such as legislative vetos, that restrict the delegation of congressional authority, are presumptively inseverable).

77. See, e.g., Sloan v. Lemon, 413 U.S. 825, 833-34 (1973) (refusing to limit application of state act reimbursing tax money to parents with children in private sectarian schools because of legislative intent surrounding that particular statute, although severability clause present).

78. Stern, *supra* note 15, at 122 n.209; Note, *supra* note 56, at 629.

79. E.g., Hill v. Wallace, 259 U.S. 44, 71 (1922) ("interwoven" provisions); Spokane Arcades, Inc. v. Brockett, 631 F.2d 135, 139 (9th Cir. 1980) (unconstitutional prior restraint provision clearly inseverable from moral nuisance statute enacted to allow rapid state action even

tions or provisions of a statute.⁸⁰ Courts should accordingly discontinue their reliance upon nonspecific severability clauses as proof of a statute's severability.⁸¹

Similarly, the absence of a severability clause should not create a presumption of inseverability.⁸² In countless instances, a legislature has failed to include a severability clause, but clearly would have enacted the legislation without the invalid provisions.⁸³ The absence of a severability clause typically indicates careless drafting or the draftsman's relative certainty of the statute's constitutionality.⁸⁴ Regardless of the explanation, the absence of a severability clause alone reveals no legislative intent regarding a statute's severability.⁸⁵

2. Nature of Legislative Veto Provisions— Congress includes legislative veto provisions in statutes for three general reasons: (1) as conditions upon the delegation of legislative authority; (2) as restraints upon previously delegated legislative authority; and (3) as procedural links to resolve constitutional disputes between the President and Con-

though severability clause present), *aff'd mem.* 454 U.S. 1022 (1981).

80. The Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 484, 613, § 846 contains a *specific* severability clause:

If any provision of, or any amendment made by, titles I and IV of this Act is held invalid by reason of being inconsistent with the Constitution, all provisions of this Act and amendments made by this Act which are separable from such invalid provision or amendment shall remain in effect.

Pub. L. No. 93-380, § 846. Incidentally, the Act contains a legislative veto provision but not in either Title I or Title IV. Pub. L. No. 93-380, § 509. For further examples of specific severability clauses, see *Carter v. Gallagher*, 337 F. Supp. 626, 628 (D. Minn. 1971) (severability clause making amendments to a specific section of the statute severable from the original act); *See generally* Stern, *supra* note 15, at 126 n.215, 127 n.216; *see also* *Zobel v. Williams*, 457 U.S. 55, 65 (1981) (a specific inseverability clause).

81. *See* Stern, *supra* note 15, at 125-28 (proposing a similar suggestion, and presenting the arguments in support of and opposition to specific severability clauses).

82. *Atkins v. United States*, 556 F.2d 1028, 1085 (Ct. Cl. 1977) (Skelton, J., concurring and dissenting) (presenting the argument that recent Supreme Court cases reject a presumption of inseverability in the absence of a severability clause: "Thus it seems clear . . . that there is no automatic presumption of inseverability just because of the absence of a specific severability clause."); Stern, *supra* note 15, at 125. An inseverability clause, however, is so unique that it undoubtedly demonstrates legislative reluctance to enact the statute except in entirety. *Zobel v. Williams*, 457 U.S. 55, 65 (1981) (statute granting state residents dividends from state mineral income on basis of length of residency unconstitutional and inseverable, although "it is . . . for the Alaska courts to pass on the severability"). In *Zobel* the inseverability clause read: "If any provisions enacted in sec. 2 of this Act . . . is held to be invalid by the final judgment, decision or order of a court of competent jurisdiction, then that provision is nonseverable, and all provisions enacted in sec. 2 of this Act are invalid and of no force or effect." *Id.* at 65.

83. *E.g.*, *Wilcox v. Consolidated Gas Co.*, 212 U.S. 19 (1909) (although no severability clause, statutory provision regulating *gas line pressure* unconstitutional and severable from *comprehensive* public utility regulatory statute); *Scheinberg v. Smith*, 659 F.2d 476 (5th Cir. 1981) (statutory provision regulating *minor's abortion* unconstitutional and inseverable from subsection, but remainder of the *Florida Medical Practice Act* remains valid, although no severability clause).

84. Stern, *supra* note 15, at 125.

85. In fact, frequent legislative use of the severability clause prompted courts to adopt the presumption of inseverability when a statute is without a severability clause. *See generally* Stern, *supra* note 15, at 120-21.

gress over the exercise of authority within the "zone of twilight."⁸⁶ Each of the three categories corresponds with traditional factors considered in resolving whether a legislature would have enacted a statute without its unconstitutional provisions. Therefore, courts may continue to use the traditional language of severability inquiries along with special consideration for the severability of legislative veto provisions.

a. *Conditions upon Delegation*— Congress frequently employs a legislative veto as a condition upon its delegation of authority to the Executive Branch or an independent agency.⁸⁷ In such circumstances, the political actors involved realize that "[t]he authority and the legislative veto are inseparable; the Administration could not have had the authority without the condition."⁸⁸ In the traditional nomenclature of severability conflicts, the presence of a legislative veto *induced* the statute's enactment. Consequently, the remainder of the statute is inseverable,⁸⁹ unless the unconstitutional provision only induced the enactment of a section without which the statute would have been enacted.

The label of "inducement clause," however, refers only to a conclusion derived from a thorough examination of a statute's legislative history. For example, statutory statements of purpose, legislative reports, roll-call votes, and legislative debate all serve to reveal the statutory purposes that induced enactment.⁹⁰ Such examinations will not eliminate disputes regarding a statute's severability; however, they will focus judicial scrutiny upon legislative purpose instead of statutory form.

b. *Restraints Upon Previous Delegation*— Congress occasionally adds a legislative veto to previously enacted statutes in order to recap-

86. CONGRESSIONAL RESEARCH SERVICE, *supra* note 34, at 14 (from introduction by Louis Fisher). For a discussion of the "zone of twilight" between presidential and congressional authority, see *Youngstown Sheet & Tube Co. v. Sawyer* 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

87. Examples of legislative vetoes operating as conditions upon delegated authority include: Federal Education Campaign Act Amendments of 1979, Pub. L. No. 96-187, §109, 93 Stat. 1339 1364, 2 U.S.C. 438(d)(2)(1982) (Federal Election Commission given authority to promulgate rules but one-House disapproval resolution retained by Congress); Act of November 16, 1973, Pub. L. No. 93-153, § 101, 87 Stat. 576, 582, 30 U.S.C. § 185(u) (1976) (concurrent resolution maintained to limit grant of authority to President for determinations whether oil exports are in national interest). See also *INS v. Chadha*, 103 S. Ct. 2764, 2795 nn.8-9 (1983) (White, J., dissenting).

88. CONGRESSIONAL RESEARCH SERVICE, *supra* note 34, at 14 (comments of L. Fisher). The President and administration officials, at times, explicitly agree to the legislative veto as a condition to greater authority. See Message to Congress Regarding Legislative Vetoes, 14 WEEKLY COMP. PRES. DOC. 1146, 1147 (June 21, 1978) (President Carter arguing against the use of legislative vetoes except in Reorganization Acts which grant the Executive broad authority to reorganize the executive branch); CONGRESSIONAL RESEARCH SERVICE, *supra* note 34, at 2.

89. E.g., *Guinn v. United States*, 238 U.S. 347, 366-67 (1915) (unconstitutional Grandfather clause in state suffrage act *induced* literacy requirement).

90. For a recent, general discussion of the various sources of legislative history and their relative worth, see Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195 (1983).

ture authority that is slipping from its control.⁹¹ Such legislative veto provisions are *amendments* to statutes. Generally, courts sever amendments to previously enacted legislation because the legislature enacted the statute without the invalid amendment.⁹² Legislative veto provisions added as amendments, however, represent congressional reassertion and strengthening of authority.⁹³ Courts, therefore, should especially scrutinize the legislative history surrounding the amending process in order to ascertain whether Congress would have repealed the statute (entirely or partially) without the addition of the legislative veto. If legislative history reveals that Congress would have repealed the statute absent the addition of the legislative veto, the statute should fall with the legislative veto provision.

c. *Procedural links*—Legislative vetos also serve to resolve the President's and Congress's competing constitutional claims to authority.⁹⁴ Congress employs legislative vetos in the "zone of twilight" between executive and congressional power when "[u]nable to define by statute the precise [substantive] boundary between the branches."⁹⁵ Such legislative vetos, in traditional severability analysis, constitute *major* provisions.

Major provisions, generally, guarantee the fulfillment of a statute's principal purpose(s).⁹⁶ Typical examples of major provisions include remedy, enforcement, and exception clauses.⁹⁷ The determinative ques-

91. Examples of legislative vetos added as restraints upon previously delegated authority include: International Security Assistance Act of 1977, Pub. L. No. 95-92, §16, 91 Stat. 614, 622, 22 U.S.C. § 2753(d)(2) (1982) (concurrent resolution used to disapprove arms transfers); Export-Import Bank Amendments of 1974, Pub. L. No. 93-646, §8, 88 Stat. 2333, 2336, 12 U.S.C. 635e (1982) (concurrent resolution required to approve President's limitation for exports to USSR in excess of \$300,000,000).

92. See, e.g., *Frost v. Corporation Comm'n*, 278 U.S. 515, 525-26 (1929) (provision requiring a license to operate a cotton gin, added as an amendment, severable because otherwise the amendment would work as a repeal).

93. See Congressional Research Service, *supra* note 34, at 14-15.

94. Examples of statutes that contain legislative vetos to resolve competing constitutional claims to authority between the political branches include: National Emergencies Act, Pub. L. No. 94-412, §202, 90 Stat. 1255, 50 U.S.C. 1622(a)(1) (1976) (concurrent resolution may terminate presidentially declared national emergency); War Powers Resolution, Pub. L. No. 93-148, §5, 87 Stat. 555, 556-57, 50 U.S.C. 1544(c) (1976) (concurrent resolution may require President to remove armed forces from foreign combat absent a declaration of War). Currently, Congress is considering replacing the concurrent resolution in the War Powers Resolution with a joint resolution that meets article I's standards for legislation. See S. 1906, 98th Cong., 1st Sess., 129 CONG. REC. S13,244-46 (daily ed. Sept. 29, 1983).

95. CONGRESSIONAL RESEARCH SERVICE, *supra* note 34, at 15.

96. See, e.g., *Guinn v. United States*, 238 U.S. 347, 366-67 (1915) (Grandfather clause in state suffrage act "so connected" to denial of black suffrage that entire act must fall); *Carter v. Carter Coal Co.*, 298 U.S. 238, 314-16 (1936) (unconstitutional price fixing provisions *essential* to comprehensive reform legislation).

97. See *Davis v. Wallace*, 257 U.S. 478, 484-85 (1921) (excepting proviso); *Spokane Arcades Inc. v. Brockett*, 631 F.2d 135, 139 (9th Cir. 1980) (enforcement provision), *aff'd mem.*, 454 U.S. 1022 (1981).

tion is whether a provision proves essential to the fulfillment of the statute's purpose(s).⁹⁸ If a statutory provision is such an essential ingredient, then the legislature probably would not have enacted the statute without such a provision. Therefore, such a major provision is inseverable from the statute's remainder.

As in determinations regarding inducement clauses, determinations of whether statutory provisions prove essential to the fulfillment of a statute's purpose(s) involve thorough examination of legislative history. Inherent uncertainty pervades such inquiry.⁹⁹ Yet emphasis upon whether a legislative veto provision, for instance, represents a major provision properly shifts judicial scrutiny from statutory form to legislative purpose.

C. *Statutory Operation after Judicial Review*

The second broad category of concern regarding severability conflicts is a statute's operation after judicial review.¹⁰⁰ After a court determines that a legislature would have enacted a statute without its invalid provision(s), it determines whether the statute remains legally and administratively operative without the unconstitutional provision(s).¹⁰¹ Legislatures are presumed to enact legislation to impose legal obligations and to grant legal rights. Accordingly, a legislature would not enact a legally inoperative statute. If a statute, therefore, becomes legally inoperative upon the excision of invalid statutory provisions, the statute falls entirely.

Additionally, a statute's administrative operation after the removal of unconstitutional provisions is a factor in a determination of severability.¹⁰² If the unconstitutional provisions pertain to the administration of a statute, the statute may become administratively difficult to implement or enforce after the invalid provisions' severance. The Supreme Court appears reluctant to impose burdensome administrative duties that did not exist in the original statutory scheme

98. See *United States v. Jackson*, 390 U.S. 570, 591 (1968); *Frost v. Corporation Comm'n*, 278 U.S. 515, 525-26 (1929) (amendment to statute not essential to act's purpose); *Williams v. Standard Oil Co.*, 278 U.S. 235, 241-45 (1928) (finding that a provision regulating gas prices was a major provision and, therefore, inseverable).

99. See *supra* notes 59-62 and accompanying text.

100. See, e.g., *INS v. Chadha*, 103 S. Ct. 2764, 2775-76 (1983); *Atkins v. United States*, 556 F.2d 1028, 1082 (Ct. Cl. 1977) (Skelton, J., concurring and dissenting), *cert. denied*, 434 U.S.1009 (1978).

101. See e.g., *INS v. Chadha*, 103 S. Ct. 2764, 2775-76 (1983); *United States v. Jackson*, 390 U.S. 570, 585 (1968); *Champlin Refining Co. v. Corporation Comm'n*, 286 U.S. 210, 234 (1932).

102. E.g., *INS v. Chadha*, 103 S. Ct. 2764, 2775 (1983) ("workable administrative machinery [remains] without the [legislative] veto provision"); *Tilton v. Richardson*, 403 U.S. 672, 684 (1971) (administration of the act impaired without the invalid provision).

upon government officials.¹⁰³ Consequently, statutes are inseverable if administration of the statute becomes unworkable or burdensome without the unconstitutional provision(s).

IV. APPLICATION OF SEVERABILITY MODEL TO THE CONGRESSIONAL BUDGET AND IMPOUNDMENT CONTROL ACT OF 1974

The Congressional Budget and Impoundment Control Act of 1974 comprehensively reformed the federal budget process and impoundment control procedure.¹⁰⁴ Titles I-IX chiefly establish a timetable for evaluation and legislation of the Executive's yearly budget proposal, and unite congressional consideration of federal expenditures and revenue.¹⁰⁵ Title X, Impoundment Control, safeguards congressional choices regarding spending priorities.¹⁰⁶ Section 1013(b) of Title X employs a one-House legislative veto provision over executive deferrals of budget authority to accommodate the Executive's recognized need for some minimal flexibility in the timing of federal spendings with Congress's traditional power of the purse. Overall, the 1974 Act has achieved qualified reform where legislative reform packages have failed for the previous fifty years.¹⁰⁷

The severability of section 1013(b) from the Congressional Budget and Impoundment Control Act of 1974 (the Act) raises two fundamental questions: (1) whether section 1013(b) is severable from the remainder of Title X; and (2) if section 1013(b) and Title X must fall jointly, whether Title X is severable from Titles I-IX of the Act.¹⁰⁸

103. See *Tilton v. Richardson*, 403 U.S. 672, 684 (1971) (plurality opinion).

104. See generally Fisher, *supra* note 2, at 413-414; A. SCHICK, CONGRESS AND MONEY 51-81 (1980) (an excellent study of the congressional budget process and the events leading to the 1974 Act).

105. E.g., Pub. L. No. 93-344, § 2, 88 Stat. 297, 31 U.S.C. § 1301 (1982) (Declaration of purposes). See generally H.R. 7130-REPORT, *supra* note 3, at 19-25 (general background information concerning the causes and aims of budget process reform); A. SCHICK, *supra* note 104, at 55.

106. See, e.g., S. 373-REPORT, *supra* note 3, at 1, 19; H.R. 7130-REPORT, *supra* note 3, at 16, 15.

107. E.g., A. SCHICK, *supra* note 104, at 51-52; J. PFIFFNER, *supra* note 3, at 110-114. See generally Note, *supra* note 46, at 1516-29 (discussion of congressional efforts to restrain presidential impoundments).

108. Arguably the severability of section 1013(b) from the Congressional Budget and Impoundment Control Act raises a third question: whether § 1002 of Title X, amendments to the Antideficiency Act, is severable from Title X. The Comptroller General has argued "that section 1002 is in fact an amendment to a statute . . . separate and apart from the remainder of the sections making up the Impoundment Control Act of 1974." COMPTROLLER GENERAL, *supra* note 7, at 9-10. Yet § 1002 is a part of Title X just as § 1016 (authorizing the Comptroller General to sue the Executive overimproperly proposed deferrals or rescissions) or § 1012 (authorizing the Executive to propose rescissions of budget authority) is a part of Title X. A statutory section is not severable from the remainder of a statute simply because the section also relates to a second statute.

Section 1002 depends upon Title X for meaning. Section 1002, in addition to removing the clause "other developments" from the Antideficiency Act, serves to link Title X with the An-

A. *The Severability of Section 1013(b) from Title X*

1. *Determination of Congressional Intent*—Traditional severability analysis first requires determination of whether the legislature would have enacted the statute without the suspect provision.¹⁰⁹ The initial inquiry, therefore, regarding section 1013(b)'s severability from Title X becomes whether Congress would have enacted Title X without the one-House legislative veto provision.

Congress did not make an explicit statement of its intent to enact Title X's provisions unconditioned upon other Title X provisions. The Impoundment Control Act of 1974 (Title X) does not contain a severability clause.¹¹⁰ S. 373, the original Senate version of Title X, did, however, contain a severability clause.¹¹¹ Legislative history does not explain why the severability clause in S. 373 disappeared when House and Senate conferees joined S. 373 and H.R. 8480 to form Title X.¹¹² In any event, as discussed above, an inference of inseverability should not arise from the absence of a severability clause.¹¹³

Congress's struggles to restrain the Executive's power generally and to reassert its own power over the timing of government expenditures were the overarching political controversies of impoundment reform legislation.¹¹⁴ Congress used section 1013(b)'s legislative veto as a condition upon the de facto delegation of impoundment authority,¹¹⁵ as a restraint upon the further erosion of congressional control over the timing of spending,¹¹⁶ and as a procedural link between the President's

tideficiency Act. *See supra* note 7. Title X, therefore, seems necessary to fulfill a fundamental purpose of § 1002. In any event, once a court finds that Congress would not have enacted Title X without § 1013(b), it could hardly find that Congress would nonetheless have enacted § 1002 alone. Consequently, the severability of § 1002 from § 1013(b) depends upon whether Title X remains valid without § 1013(b).

109. *See supra* text accompanying note 57.

110. Furthermore, no severability clause exists in the remainder of the Congressional Budget and Impoundment Control Act of 1974.

111. S. 373, 93d Cong., 1st Sess. § 10, 119 CONG. REC. 1150-52 (1973). S. 373 was originally an anti-impoundment bill (no executive impoundment unless congressional approval). Anti-impoundment legislation often included severability clauses. *E.g.*, H.R. 6206, 93d Cong., 1st Sess. § 401, 119 CONG. REC. 11384-86 (1973).

112. *See, e.g.*, H.R. Rep. No. 1101, 93d Cong., 2d Sess. 76 (1974) (Conference Report—no explanation offered). H.R. 8480 did not contain a severability clause. *See* H.R. 8480, 93d Cong., 1st Sess. (1973). H.R. 8480 is printed in *Hearings before the House Comm. on Rules on H.R. 5193 and Related Bills*, 93d Cong., 1st Sess. 505 (1973).

113. *See supra* text accompanying notes 82-85.

114. *E.g.*, Levine, *supra* note 2; J. PFIFFNER, *supra* note 3, at 1-7; A. SCHLESINGER, *THE IMPERIAL PRESIDENCY* 396-400 (1973); J. SUNDQUIST, *THE DECLINE AND RESURGENCE OF CONGRESS* 1-2, (1981).

115. *See generally* Comptroller General, *supra* note 7 (concluding that § 1013(b) grants temporary impoundment authority where no other statutory authority exists).

116. Section 1013(b) limits the Executive's use of delegated impoundment authority under the Antideficiency Act of 1950, *See* Pub. L. No. 93-344 § 1002, 88 Stat. 297 (1974), 31 U.S.C. § 665(c)(2) (1982).

and Congress's competing constitutional claims concerning impoundment.¹¹⁷ The varied and occasionally multiple roles of legislative vetoes, such as section 1013(b), compel courts to scrutinize legislative vetoes within their particular statutory framework and not within generalized models of severability.¹¹⁸ The following analysis highlights section 1013(b)'s role in the formation of Title X and the unlikelihood of Title X's passage without section 1013(b).

The central dispute in Congress regarding impoundment reform legislation was the approval mechanism by which executive impoundments became effective.¹¹⁹ Specifically, the House and Senate split over whether executive impoundments should be effective unless congressionally disapproved,¹²⁰ or ineffective unless congressionally approved.¹²¹ The two chambers of Congress differed so intransigently regarding the appropriate impoundment approval mechanism that S. 373 and H.R. 8480 never surfaced after the appointment of a conference committee in 1973.¹²²

The conference committee on the Act resolved the impasse by com-

117. See generally A. SCHICK, *supra* note 9, at 28 (Title X provides a "legislative control procedure without reaching the constitutional issue of whether the President possesses any inherent power to impound."). Section 1001(1) of Title X disclaims any view regarding constitutional justification for impoundments: "Nothing contained in this Act, or in any amendments made by this Act, shall be construed as (1) asserting or conceding the constitutional powers or limitations of either the Congress or the President." 2 U.S.C. § 681 (1982). Together, Section 1013(b) and Title X serve to link procedurally the conflicting claims of the President and Congress of ultimate control of spending. Title X joins the principal statutory basis of impoundment, the Antideficiency Act, with Title X's procedural control over impoundment. "Reserves established pursuant to this subsection, [Antideficiency Act, as amended, 31 U.S.C. § 665(c)(2),] shall be reported to the Congress in accordance with the Impoundment Control Act of 1974." Pub. L. No. 93-344, § 1002, 88 Stat. 297 (1974). See Comptroller General, *supra* note 7, at 14.

118. Section 1013(b)'s severability from Title X does not depend upon whether § 1013 delegates impoundment authority. Section 1013(b)'s various roles — as a condition upon de facto delegation, a limit upon previous delegation, and a procedural link between the political branches — demonstrate the futility of pigeonholing when determining the severability of a legislative veto provision. Even if Title X does not delegate authority to the Executive, § 1013(b)'s importance to Title X and the Act does not diminish. Section 1013(b)'s other roles would survive a finding that § 1013 does not restrict the congressional power to delegate authority. Regarding the severability of § 1013(b) from Title X, the principal question remains unchanged: would Congress have enacted Title X without § 1013(b)? *But see* Rosenberg, *supra* note 14, at 30 (comments of Richard Ehlike). This Note assumes that Title X, at least, delegated de facto authority. See *infra* text accompanying notes 130-31.

119. E.g., 120 CONG. REC. 7657-58 (1974) (remarks of Sen. Muskie); 119 CONG. REC. 25,563 (1973) (remarks of Rep. Pickle); Schick, *supra* note 9, at 42.

120. H.R. 8480 required congressional action, a one-House disapproval resolution, to defeat an impoundment of funds. H.R. 7130-REPORT, *supra* note 3, at 17-18.

121. S. 373, as originally introduced, prohibited impoundments unless affirmatively approved by a concurrent resolution of Congress. *Impoundment of Appropriated Funds by the President: Joint Hearings on S. 373 Before the Ad Hoc Subcomm. on Impoundment of Funds of the Senate Comm. of Government Operations and the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 9-10 (1973) (version of S. 373 as introduced by Sen. Ervin on January 16, 1973) [hereinafter cited as *S. 373-Hearings*].

122. "Neither side was interested in going to conference because there was now way of compromising those two fundamentally contrary theories." 120 CONG. REC. 7658 (1974) (remarks

binning the approval mechanisms of S. 373 and H.R. 8480.¹²³ Congressional leaders later stated that the impoundment reform stalemate would have remained unresolved without the conference committee's compromise.¹²⁴ Section 1013(b) functioned as the linchpin to that compromise. Section 1013(b)'s one-House veto over executive deferrals provides the Executive flexibility over ministerial decisions to delay spendings, and ensures close congressional supervision over the timing of federal expenditures. Congress, therefore, would not have passed impoundment reform legislation without a legislative veto provision.

Additionally, Congress explicitly sought a mechanism to rescind impoundments without further legislation, and to eliminate the necessity of providing all appropriations legislation with mandatory spending language.¹²⁵ On several occasions, Congress rejected proposals that required legislation or bicameral action to defeat impoundments. The Senate rejected a proposal to allow impoundments unless Congress disapproved by joint resolution.¹²⁶ The House of Representatives rejected amendments to H.R. 8480 and H.R. 7130 that would have required a concurrent resolution of disapproval to defeat impoundments.¹²⁷ Although federal courts generally found mandatory spending language within appropriations legislation, Congress did not wish to rely upon the judiciary to abrogate impoundments.¹²⁸ Congress finally agreed upon section 1013(b)'s deferral mechanism as the means to avoid the need for further legislation or mandatory spending language.

Title X neither asserts nor concedes any constitutional or statutory authority regarding executive impoundments.¹²⁹ The deferral mechanism, however, marks a significant congressional concession to the Executive by legitimizing presidential impoundments.¹³⁰ Nevertheless, without section 1013(b)'s one-House legislative veto provision, Congress would have, in effect, conceded that impoundments may constitutionally persist

of Sen. Muskie). "[T]he conferees deferred action on the impoundment legislation pending consideration of the congressional budget bill" after only one conference meeting. Schick, *supra* note 9, at 6.

123. *E.g.*, CONFERENCE REPORT, *supra* note 2, at 79; A. SCHICK, *supra* note 104, at 70-71. Section 1012 incorporates S. 373's affirmative approval mechanism. Section 1013 incorporates H.R. 8480's negative approval mechanism.

124. *E.g.*, 120 CONG. REC. 20, 464-65 (1974) (remarks of Sen. Ervin).

125. *E.g.*, 119 CONG. REC. 19, 334-35 (1973) (remarks of Rep. O'Neill); Abascal & Kramer, *supra* note 47, at 169, 179-80.

126. S. 373-REPORT, *supra* note 3, at 2 (explanation of S. 373's background including rejection of S. 2027 which proposed that a joint resolution be required to defeat Executive impoundment).

127. 119 CONG. REC. 25,573-76, 39,725-26 (1973) (Rep. Anderson's proposed amendments). On July 24, 1973, the House narrowly defeated (205-206) Rep. Anderson's amendment to H.R. 8480. For a contemporary report of Rep. Anderson's efforts to amend H.R. 8480 (and later H.R. 7130), see 31 CONG. Q. WEEKLY REP. 2067 (1973).

128. *E.g.*, S. 373-REPORT, *supra* note 3, at 9.

129. See *supra* note 38.

130. *E.g.*, Fisher, *supra* note 43, at 200-01; Abascal & Kramer, *supra* note 47, at 150-51.

in the absence of additional mandatory spending language. In 1974, Congress did not intend to expand executive discretion in such a manner.¹³¹

In summary, Congress would not have enacted Title X without section 1013(b). Section 1013(b) limits executive discretion, and yet provides a procedural link between Congress' power of the purse and the President's claim to control partially the timing of expenditures. The removal of section 1013(b) would greatly expand executive power.¹³² No intent existed in the second session of the 93d Congress (1974) to expand Executive authority. Section 1013(b), therefore, is inseverable from Title X.

2. *Title X's Operation without Section 1013(b)*— Congressional intent surrounding impoundment reform legislation indicates that Congress would not have enacted Title X without section 1013(b). Nonetheless, complete analysis of the severability of section 1013(b) from Title X requires examination of Title X's legal and administrative operation without section 1013(b).¹³³ The impoundment process in general — and the deferral process in particular — would remain administratively operative without section 1013(b)'s legislative veto. First, the President would remain compelled to report deferrals.¹³⁴ Second, deferrals still would not extend beyond the fiscal year in which the Executive proposed them.¹³⁵ Third, the President would remain prohibited from using the deferral mechanism to rescind or reserve funding.¹³⁶ Finally, Congress still could enact legislation defeating deferrals or attach deferral disapproval riders to other legislation.¹³⁷ Congress and the Executive,

131. For an excellent summary of Congress' efforts to reassert itself against the abuses of the Nixon administration, see J. SUNDQUIST, *supra* note 114, at 1-3. See generally A. SCHLESINGER, *supra* note 114 (historical overview of the ascendancy of the Executive in the 20th century culminating in the Nixon presidency).

132. Without § 1013(b), only legislation could limit the President's power to defer spending budget authority under Title X. Consequently, excision of § 1013(b) broadens the Executive's control over the timing of federal expenditures. See *McCorkle v. United States*, 559 F.2d 1258, 1261 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978). The *McCorkle* court held a one-House legislative veto provision over presidential salary recommendations inseverable from the Federal Salary Act of 1967 because "[w]hen the questioned clause restricts a power granted by the legislature, the case against severance is strong." But see *Consumers Energy Council of Am. v. Federal Energy Regulatory Comm'n*, 673 F.2d 425, 445 n.70 (D.C. Cir. 1982), *aff'd mem. sub nom. Gas Consumers Group v. Consumers Energy Council of Am.*, 103 S. Ct. 3556 (1983) (rejection of per se rule classifying legislative veto provisions as limitation clauses and, therefore, inseverable). The proposed severability model agrees with the D.C. Circuit's case by case approach to the severability of legislative veto provisions. See *supra* text accompanying notes 63-99.

133. See *supra* text accompanying notes 100-03.

134. 2 U.S.C. § 684(a) (1982).

135. *Id.*

136. *Id.* § 684(c) (1982).

137. Subsequent to *Chadha*, Congress disapproved the deferral of budget authority for the United States Railway Association, attaching a disapproval rider to a supplemental appropriations act to rescind the deferral. Supplemental Appropriations Act, Pub. L. No. 98-181, tit.

in short, would possess the same reporting and other administrative responsibilities under Title X absent section 1013(b). Title X, therefore, would remain administratively operative without section 1013(b).

Similarly, Title X would remain legally operative without section 1013(b). Section 1013(b)'s absence would affect neither the distribution of constitutional power nor statutory authority regarding executive impoundments.¹³⁸ The Executive would remain statutorily authorized to defer budget authority at his discretion upon report to Congress.¹³⁹

Although Title X remains legally and administratively operative without section 1013(b), Title X and section 1013(b) appear mutually dependent and therefore inseverable. Assuming the inseverability of section 1013(b) from Title X, the question then becomes whether Title X is severable from Titles I-IX of the Congressional Budget and Impoundment Control Act.

B. The Severability of Title X from Titles I-IX

Examination of the severability of Title X from Titles I-IX proceeds in the same manner as the examination of section 1013(b)'s severability from Title X, absent the modifications for the severability of legislative veto provisions.

1. *Determination of Congressional Intent*— At first blush, it appears that Congress would have enacted Titles I-IX without Title X. The Act originated from two separate bodies of legislation. Titles I-IX arose from S. 1541 and H.R. 7130. Title X arose, through separate hearings and committees, from S. 373 and H.R. 8480.¹⁴⁰ The conference committee that drafted the Act's present language indicated the Act's

IX, ch. V, 97 Stat. 1153, 1296 (1984).

Chief Justice Burger, in *Chadha*, referred to an analogous, constitutional means to maintain congressional control over the suspension of deportation proceedings for persons situated as Chadha. *INS v. Chadha*, 103 S. Ct. 2764, 2776 n.9 (1983). Chief Justice Burger wrote that § 244(c)(2) "resembles" a report and wait provision when the legislative veto provision is eliminated. *Id.* Generally, a report and wait provision compels an administrative agency to report proposed regulation changes to the appropriate congressional committee. If the committee reports out a disapproval of the regulation change, the regulation's implementation is delayed to allow the entire Congress an opportunity to enact legislation preventing the proposed regulation. If no congressional action regarding the regulation is forthcoming within a specified period of time, the regulation becomes effective. *See, e.g.*, 42 U.S.C. § 3535(o)(1)-(6) (Supp. II 1978) (report and wait provision for the Department of Housing and Urban Development). *See generally* Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 VA. L. REV. 253, 257 n.9 (1982) (explanation of report and wait provisions along with other spurious "legislative vetos"). Unlike genuine report and wait provisions in which the statute quo *before* the administrative agency's proposal persists for a specified period of time, the President's deferral of budget authority becomes effective immediately upon report. Therefore, § 1013 does not operate as a report and wait provision without § 1013(b).

138. *See supra* note 38 and accompanying text.

139. 2 U.S.C. § 684(a) (1982).

140. *See generally* A. SCHICK, *supra* note 104, at 51-81 (an excellent, concise account of the

dual sources when it specified distinct short titles for Titles I-IX and Title X.¹⁴¹ Additionally, Congress has codified Title X separately from the remainder of the Act.¹⁴²

The boundaries of statutory sections, however, do not determine severability.¹⁴³ Additionally, substantive evaluation of the Act's aims and legislative history reveals joint purposes and significant interdependency among Titles I-IX and Title X.

Congress viewed Titles I-IX and Title X as jointly necessary for comprehensive budget reform.¹⁴⁴ In 1972, Congress responded to President Nixon's criticisms of institutional and personal fiscal irresponsibility within Congress¹⁴⁵ by establishing the Joint Study Committee on Budget Control.¹⁴⁶ President Nixon's unprecedented "policy impoundments" exacerbated the "Battle of the Budget" between the Democratic Congress and President Nixon.¹⁴⁷ Yet even President Nixon's staunchest congressional opponents realized (logically and politically) that Congress must reform its own budget process before confronting President Nixon with regard to his impoundments.¹⁴⁸

legislative history of the Act); H.R. 7130-REPORT, *supra* note 3, 16-26 (legislative history and background information concerning budget process and impoundment control reform in the House).

141. Section 1(a) states: "This Act may be cited as the 'Congressional Budget and Impoundment Control Act of 1974'. Titles I through IX may be cited as the 'Congressional Budget Act of 1974' and Title X may be cited as the 'Impoundment Control Act of 1974.'" Pub. L. No. 93-344, § 1(a), 88 Stat. 296, 297 (1974).

142. 2 U.S.C. §§ 681-688 (1982) (Chapter 17B-Impoundment Control).

143. The Supreme Court, contrarily, has suggested both that (1) an invalid provision within a statutory section is likely inseverable from the remainder of the section, *Carter v. Carter Coal Co.*, 298 U.S. 238, 314 (1936); and (2) that the boundaries of statutory sections do not determine a statute's severability. *Berea College v. Kentucky*, 211 U.S. 45, 54-55 (1908); *Leob v. Columbia Township Trustees*, 179 U.S. 472, 489-90 (1900). The proposed severability model would follow the Supreme Court's implicit rejection of *Carter* in *Buckley v. Valeo*, 424 U.S. 1, 108-09 (1976) (*per curiam*), and disregard artificial legislative divisions of statutory sections. Congressional intent should guide all judicial determinations of statutes' severability.

144. Representative Bolling, member of the House Committee on Rules (committee which reported on H.R. 7130) and ranking House majority member on the Conference Committee, summed Congress' sentiments when he said that "in my judgment [budget reform] is a waste of time" without impoundment restrictions. 119 CONG. REC. 39,723 (1973). See also 119 CONG. REC. 25,556-57 (1973) (Remarks of Rep. Anderson); 120 CONG. REC. 7157 (1974) (Remarks of Sen. Nunn); 120 CONG. REC. 19,688 (1974) (Remarks of Rep. Broyhill); H.R. 7130-REPORT, *supra* note 3, at 16; Fisher, *supra* note 2, at 444.

145. E.g., President's Special Message to the Congress on Federal Government Spending, PUB. PAPERS, 742 (July 26, 1972) ("hoary and traditional procedure of the Congress, which now permits action on the various spending programs as if they were unrelated and independent actions"); President's News Conference of January 31, 1973, 9 WEEKLY COMP. PRES. DOC. 105, 109-110 (Jan. 31, 1973) (institutional and personal fiscal irresponsibility justify impoundments).

146. See generally A. SCHICK, *supra* note 104, at 39-41; J. PFIFFNER, *supra* note 3, at 122-24; see also H.R. 7130-REPORT, *supra* note 3, at 18-19.

147. See generally J. PFIFFNER, *supra* note 3, at 3 ("[T]he 1974 Budget Act would not have been passed were it not for a threat perceived by the Congress that its constitutional spending power was being usurped by President Nixon.").

For a discussion explaining why President Nixon's impoundments were distinct from his predecessors' impoundments, see Fisher, *supra* note 43, at 175-201.

148. E.g., H.R. REP. NO. 336, 93d Cong., 1st Sess. 529, 531 (1973).

Congress realized the interdependency of budget process and impoundment reform legislation.¹⁴⁹ Congress feared that impoundment control legislation alone would not lessen President Nixon's ability to use Congress's fragmented budget process as justification for further impoundments. Congress also feared that budget process reform legislation alone would not sufficiently protect Congress's budgetary policies from an Executive's impoundments justified by claims of constitutional duty and economic efficiency.¹⁵⁰ Budget process reform without impoundment control was "a hopeless exercise" and a "waste of time" in the eyes of the 93d Congress.¹⁵¹ Congressmen packaged impoundment control and budget process reform legislation together early in 1973.¹⁵² In November 1973, the House Committee on Rules reported that "[b]udget reform and impoundment control have a joint purpose: to restore responsibility for the spending policy of the United States to the legislative branch."¹⁵³ Additionally, congressional supporters and opponents of President Nixon opposed budget process reform and permanent impoundment reform enacted separately.¹⁵⁴

149. *E.g.*, 120 CONG. REC. 20,464-65 (1974) (remarks of Sen. Ervin); Fisher, *supra* note 2, at 413-14.

150. H.R. 7130-REPORT, *supra* note 3, at 16. The Committee report reasoned:

Budget reform and impoundment control have a joint purpose: to restore responsibility for the spending policy of the United States to the legislative branch. One without the other would leave Congress in a weak and ineffective position. No matter how prudently Congress discharges its appropriations responsibility, legislative decisions have no meaning if they can be unilaterally abrogated by executive impoundments. On the other hand, if Congress appropriates funds without full awareness of the country's fiscal condition, its actions may be used by the President to justify the improper withholding of funds. By joining budget and impoundment control in a complete overhaul of the budget process, H.R. 7130 seeks to ensure that the power of appropriation assigned to Congress by the Constitution is responsibly and effectively exercised.

151. 120 CONG. REC. 7,658 (1974) (remarks of Sen. Muskie); 119 CONG. REC. 39,723 (1973) (remarks of Rep. Bolling).

152. *E.g.*, S. 905, 93d Cong., 1st Sess., reprinted in STAFF OF THE SENATE SUBCOMM. ON BUDGETING, MANAGEMENT, AND EXPENDITURES, 93D CONG., 1ST. SESS., IMPROVING CONGRESSIONAL CONTROL OVER THE BUDGET — A COMPENDIUM OF MATERIALS 85 (Comm. Print 1973) [hereinafter cited as COMPENDIUM]; S. 1030, 93d Cong., 1st Sess., reprinted in COMPENDIUM, *supra*, at 107.

153. H.R. 7130-REPORT, *supra* note 3, at 16. The Senate's version of the Act restricted impoundments to the narrow managerial purposes that Congress originally envisioned in the Antideficiency Act. 120 CONG. REC. 7,658-59 (1974) (remarks of Sen. Muskie). *See* S. 1541, 93d Cong., 2d Sess. (1974). The Senate apparently hoped that the Conference committee would resolve the impoundment reform impasse. Yet the Senate apparently was unwilling to enact budget reform without significant limitation upon the Executive's power to impound. *See generally* Schick, *supra* note 9, at 6-7 (tracing the Senate's various motives for approaching the Act's Conference Committee without a more conciliatory version of impoundment reform, such as S. 373, attached to S. 1541).

154. *E.g.*, 119 CONG. REC. 25,541, 25,556-57 (1973) Representatives Ford and Anderson persuaded the House that H.R. 8480, impoundment control, detached from budget-process reform was unwise. Consequently, the House of Representatives amended H.R. 8480 to limit its operation to one year with the expectation that permanent impoundment control would be incorporated into budget-process reform at a later date. H.R. 7130—Report, *supra* note 3, at 35; *see also* 120 CONG. REC. 19,688 (1974) (REMARKS OF REP. BROYHILL); S. 373-REPORT, *supra* note 3, at

Finally, the impoundment impasse¹⁵⁵ between the two chambers threatened the enactment of the entire Congressional Budget and Impoundment Control Act.¹⁵⁶ Representative Bolling, ranking member of the House Conference Committee, informed the House that impoundment reform — not budget process reform — threatened to deadlock the Act's Conference Committee: "[T]he dilemma that confronted us [the Conference Committee] was a Senate position on impoundment which was virtually the exact opposite of the House position. We recognized that we must come to grips with that matter or we would probably lose the whole matter, both budget control and impoundment control."¹⁵⁷

Although Titles I-IX and Title X exist separate in form, legislative history demonstrates their interdependence in purpose and enactment. Therefore, Title X should be inseverable from Titles I-IX. Courts, however, may find Title X severable from Titles I-IX due to the significance and comprehensive nature of the Congressional Budget and Impoundment Control Act. Further support for Title X's severability from Titles I-IX exists because Titles I-IX clearly remain administratively and legally operative without Title X.

2. *Titles I-IX's Operation without Title X*— The excision of Title X does not affect the administrative operations of Titles I-IX. Titles I-IX establish the congressional budget mechanisms.¹⁵⁸ The presence of Title X may cause Congress and the President to approach budgetary conflicts differently. For example, the Executive may more readily accept a budget item if he believes the possibility for deferral exists at a later date,¹⁵⁹ especially if Congress must enact legislation to defeat a deferral of budget authority. No formal procedural link, however, exists between the budget process (Titles I-IX) and the resolution of impoundment controversy (Title X). Titles I-IX, therefore, would remain administratively operative despite Title X's absence. Likewise, Title X's absence would have no effect upon the legal operation of Titles I-IX. Titles I-IX impose legal obligations upon the Executive branch and Congress and establish enforcement procedures independently of Title X.

Titles I-IX remain legally and administratively operative without Title X. Nonetheless, the Act's legislative history reveals that: (1) Titles I-

33 (minority views of Sens. Saxbe, Roth, Gurney, and Brock); *id.* at 36 (remarks of Sen. Percy); Fisher, *supra* at note 2, at 444.

155. See *supra* text accompanying notes 119-24.

156. 120 CONG. REC. 19,674 (1974) (remarks of Rep. Bolling); see also A. SCHICK, *supra* note 104, at 70.

157. 120 CONG. REC. 19,674 (1974).

158. Pub. L. No. 93-344 § 1(a)-(b), 88 Stat. 296, 297-98 (1974) (short titles and Table of Contents).

159. See Fisher, *supra* note 2, at 450-54.

IX ensure executive compliance with Title X by removing economic austerity and congressional fiscal irresponsibility as justifications for impoundments; and (2) Title X protects the integrity of Titles I-IX's budget process by safeguarding Congress's budgetary choices. Congress passed the Act during an era of congressional resurgence.¹⁶⁰ Congress did not seek partial budgetary reform.¹⁶¹ Congress enacted and heralded the Act as *comprehensive* budget reform that reasserted Congress as the final arbiter over the federal purse.¹⁶² The Act's titles are mutually dependent. It appears, therefore, that Congress would not have enacted Titles I-IX without Title X. Consequently, Title X should be inseverable from Titles I-IX.¹⁶³

CONCLUSION

Section 1013(b) is a legislative veto provision. Although the legislative veto provision invalidated in *Chadha* arguably poses a greater threat to the underlying philosophy of article I than section 1013(b), the Supreme Court's invalidation of the legislative veto provision in *Chadha* logically extends to require invalidation of section 1013(b). Legislative history indicates that Congress neither would have enacted Title X without section 1013(b) nor Titles I-IX without Title X. Section 1013(b) was the essential part of the congressional compromise that allowed the enactment of Title X and, consequently, the enactment of the Congressional Budget and Impoundment Control Act of 1974. Therefore, Title X and section 1013(b), and Titles I-IX and Title X, are respectively inseverable. Consequently, the unconstitutionality of section 1013(b) requires the invalidation of the entire Congressional Budget and Impoundment Control Act of 1974.

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160. See generally, J. SUNDQUIST, *supra* note 114, at 1-3.

161. President Nixon's comments in his memoirs reveal that the second session of the 93d Congress was not a period of "partial" reform or action: "In the second term, I had thrown down a gauntlet to Congress . . . and challenged them to an epic battle. We had already skirmished over the limitations of prerogative and power represented in . . . the impoundment of funds, and the battle of the budget." R. NIXON, *RN: THE MEMOIRS OF RICHARD NIXON* 850 (1978).

162. E.g., H.R. 7130-REPORT, *supra* note 3, at 16-18; Abascal & Kramer, *supra* note 47, at 168.

163. See *supra* text accompanying notes 57-58.